IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5370

DOYLE V. TATUM,

Plaintiff-Appellee,

v.

CITY OF TEXARKANA, ET AL.,

Defendants,

M. HAIRSTON and B.J. AUSTIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(92-CV-48)

Before WISDOM, KING, and DUHE, Circuit Judges.

PER CURIAM:

Doyle Tatum sued two Texarkana, Texas police officers and their municipal employer under 42 U.S.C. § 1983 alleging, inter alia, that the

officers used excessive force and denied him medical attention in the course of arrest. One of the officers, Brenda Austin, appeals from the district court's denial of her motion for summary judgment on grounds of qualified immunity. We reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 4, 1982, Loyce Gates, an animal control officer of the City of Texarkana, Texas, issued a "Courtesy Warning Notice" to Tatum for failing to obtain a license for his dog and for violating that city's leash law. Tatum signed the warning notice to acknowledge its receipt. Over the next five months, Gates attempted to contact Tatum by phone and left numerous notices on Tatum's door reminding Tatum that he had to comply with the law. In August, 1982, after checking city records and finding that Tatum still had not obtained a license for his dog, Gates filed an offense report against Tatum. Gates also filed a sworn criminal complaint charging Tatum with failing to obtain a dog

license. A municipal court judge then issued a warrant for Tatum's arrest.

Eight years passed. On May 1, 1990, Texarkana police officer Dwayne Lorance was assigned to warrant duty and went to Tatum's residence to advise him of the existence of the outstanding warrant and to arrange for its resolution. Tatum agreed to visit the warrant officer at the police station two days later, and Lorance left Tatum's residence without incident.

After contemplating the situation for a few minutes, Tatum called the police department and asked to speak to the officer who had been serving warrants, to see if he could "get that thing ironed out that night" because Tatum believed the he neither lived in Texarkana now owned a dog in 1982. As Lorance was no longer on duty, the Texarkana police dispatched officer Brenda Austin and Mike Hairston to Tatum's residence to try to resolve the matter.

Officer Hairston arrived at the Tatum residence first. Hairston radioed back tot he

police department and confirmed the existence of the warrant. Tatum informed Hairston that another officer, Lorance, had come by earlier and agreed to let Tatum come by the station in two days. Officer Austin, who had also confirmed the existence of the warrant, arrived at Tatum's residence and was also informed of Officer Lorance's earlier visit.

What occurred next is unclear. Tatum alleges that, despite their knowledge of Tatum's earlier agreement with Lorance, Austin and Hairston decided to arrest him, although he admitted in his deposition that he never asked the officers to delay the arrest. Officer Austin asserted in her deposition that she offered to let Tatum come tot he police station the next day; however, Austin contends that Tatum insisted upon settling the matter that night. Austin informed Tatum that the matter could be settled immediately only by arresting Tatum.

Austin informed Johnson that he was under arrest. Tatum then told the officers that he had

recently undergone back or neck surgery. Austin responded by asking Tatum if he would have any problem placing his hands behind his back to accommodate handcuffs. Tatum replied that he would not have difficulty, and demonstrated his mobility by holding his arms out to the side and waving them behind his back. Austin placed the handcuffs on Tatum and asked Tatum if he was in any pain. Tatum replied that he was not. Austin led Tatum to her patrol care without exerting any force. As Tatum began to get into the patrol car, he stopped halfway and informed Austin that "this is not going to work."

Tatum contends that Austin then placed her hand atop Tatum's head and "shoved" his head downward and into the patrol car. Austin denies touching Tatum's head or making any other physical contact with Tatum. Austin buckled Tatum's seat belt around him, closed the door, and proceeded to drive to the police station. En route, Tatum asserts that he told Austin that he was in "tremendous pain' and asked Austin to

release his left arm from the handcuffs to alleviate the pain. Tatum asserts that Austin did not respond. He also assets that he complained of pain two additional times before arriving at the police station, but received no response from Austin other than noticing that she sped up after his third complaint. Austin claims that Tatum only complained of pain once. Tatum concedes that he never asked Austin for medical attention.

Once at the police station, Austin unfastened Tatum's handcuffs and booked him. Tatum did not complain of pain after arriving at the police station. Tatum was released that night after posting bail. Upon his release, Tatum went to the emergency room of a local hospital complaining of pain in his neck, back, and left arm. The emergency room physician examined and released Tatum. The following day, Tatum visited a neurosurgeon who had previously performed surgery on his back. The physician prescribed some painkillers and asked Tatum to

return if the pain continued. Tatum visited the neurosurgeon numerous times over the next year and a half, complaining of continuing pain in his neck, back, and left arm. Finally, approximately nineteen months after the arrest, Tatum underwent surgery on his neck to remove bone spurs. Tatum instituted suit against Hairston, Austin, and the City of Texarkana, alleging violation of his federal constitutional rights to be free from unlawful arrest and excessive force and to obtain reasonable medical attention while in police custody. Hairston and Austin moved for summary judgment from all claims based upon the defense of qualified immunity. The district court granted the motion as to the unlawful arrest claim, but denied their motion as to the excessive force and medical attention claims. Austin now appeals the district court's denial of her motion for summary judgment[1],

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[1] An order denying a motion for summary judgment based upon a claim of qualified immunity in a § 1983 action, to the extent that it turns upon an issue of law, is immediately appealable. Mitchell v. Forsyth, 472 U.S. 511, 5320 (1985).

asserting that she is entitled to qualified immunity for her actions.[2] We agree and reverse.

II. STANDARD OF REVIEW

This court reviews the denial of summary judgment ont he basis of qualified immunity de novo, examining the evidence in the light most favorable to the nonmoving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992). Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1118-19 (5th Cir. 1992); Fed. R. Civ. P. 56(c).

To determine whether a governmental official is entitled to qualified immunity, a court must

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[2] Tatum has advised the defendants that he intends to dismiss his remaining claims against Hairston. Thus, Hairston is not a party tot his appeal. We also note that the district court denied the City of Texarkana's motion for summary judgment on the unlawful arrest claim; however, the city is not a party to this appeal.

first ascertain whether the plaintiff has asserted the violation of a clearly established constitutional right. Siegart v. Gilley, 500 U.S. 226, 232 (1991); Correa v. Fischer, 982 F.2d 931, 933 (5th Cir. 1993). This court uses "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cirt. 1993). Second, the Court must determine whether a reasonable official in the defendant's shoes would have understood that his conduct violated the plaintiff's constitutional rights. Anderson v. Creighton. 483 U.S. 635, 640 (1987); Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 114 S. Ct. 1081 (1994). Thus, even if the official's conduct violates a constitutional right, she is entitled to qualified immunity if her conduct was objectively reasonable. Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993); Salas, 980 F.2d at 305-06; Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). The

reasonableness of the defendant's actions is assessed in light of the legal rules clearly established at the time of the incident. Johnson v. City of Houston, 14 F.3d 1056, 1060 (5th Cir. 1994); Spann, 987 F.2d at 1114.

III. ANALYSIS

A. *Excessive Force Claim.*

Tatum had made the requisite threshold allegation of the violation of a constitutional right to be free from excessive force. The Fourth Amendment right to freedom from unreasonable seizures protects arrestees from the use of excessive force by the arresting officer.[3]

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[3] Austin argues that our recent decision in Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir.), cert. denied, 63 U.S.L.W. 3437 (1994), requires us to use a Fourteenth Amendment due process analysis rather than a Fourth Amendment "Reasonableness" analysis. We disagree. Brothers used a due process analysis in the context of analyzing a claim filed by a pretrial detainee, who was subjected to excessive force after the incidents of arrest had been completed. Id. at 457. The Brothers use of the Fourteenth Amendment was premised upon our earlier decision in Valencia v. Wiggins, 981 F.2d 1440 (5th Cir.), cert. denied, 113 S. Ct.2998 (1993), which held that the use of a Fourth Amendment analysis is inappropriate when the alleged excessive force occurs "after the incidents of arrest are

Graham v. Connor, 490 U.S. 386, 388 (1989); King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). Thus, our inquiry focuses on whether a reasonable officer standing in the shoes of Austin would have known that her actions violated Tatum's constitutional rights.

Tatum was arrested on May 1, 1990. Our reasonableness analysis must therefore begin with a determination of the clearly established law as it existed on May 1, 1990. Spann, 987 F.2d at 1114. In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court held that, in assessing an excessive force claim, courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against

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completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention for a significant period of time." Id. at 1444. In this case, the alleged excessive force took place before Tatum's arrest had been completed, before Tatum had been released from Austin's custody, and before Tatum had been in detention for a significant period of time. Hence, the Fourth Amendment, rather than the Fourteenth Amendment, provides the appropriate framework for analyzing Tatum's excessive force claim.

the countervailing governmental interests at stake." Graham, 490 U.S. at 396. In so balancing, we are to pay "careful attention to the facts and circumstances of each particular case. . ." Id. Furthermore, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id.

In addition to Graham, at the time of Tatum's arrest, this court had decided Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989) (per curiam) (en banc), which required § 1983 plaintiffs alleging excessive force to show "significant injury" to succeed in a constitutional excessive force claim.[4] Therefore, in determining the

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[4] The "significant injury" requirement has since been abrogated by the Supreme Court's decision in Hudson v. McMillan, 112 S. Ct. 995 (1992). See Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994) ("We now hold that the Johnson [significant injury] standard is no longer valid in the wake of Hudson v. McMillan to assess whether plaintiff has alleged a constitutional violation.") (citation omitted).

objective reasonableness of Austin's use of force in 1990, the court should apply the significant injury test of Johnson since that was the constitutional benchmark when the events occurred. Harper v. Harris County, Tex., 21 F.3d 597, 601 (5th Cir. 1994); Rankin v. Klevenhagen, 5 F.3d 103, 108-09 (5th Cir. 1993). Thus, the seriousness of Tatum's injuries is relevant to our inquiry as to whether Austin's conduct was objectively reasonable. Harper, 21 F.3d at 601. However, as Graham makes clear, in assessing the various factors that comprise the reasonableness inquiry, we are to view the situation from the perspective of the officer at the scene, without the aid of 20/20 hindsight. Thus, in assessing the seriousness of Tatum's injury, we must disregard subsequent manifestations of illness which were not reasonably foreseeable at the time Tatum was arrested.

Thus, under Graham, our first task is to assess the "nature and quality of the intrusion of the individual's Fourth Amendment interests."

Id. Taking the facts in the light most favorable to Tatum, we think that the "nature and quality" of the force employed by Austin was de minimis. The force alleged to be excessive by Tatum is a "shove" on Tatum's head. Although Austin knew that Tatum had undergone neck or back surgery, Tatum had not yet complained of any pain. Instead, Tatum indicated that he was flexible enough to place his hands in handcuffs behind his back. His only statement to Austin prior to the shove was, "This is not going to work." This statement did not unequivocally suggest that Tatum was experiencing medical difficulties. Indeed, it would be reasonable for an officer in Austin's shoes to interpret this statement as indicating that Tatum, who was handcuffed, was having difficulty entering the patrol car without assistance. Even assuming that Tatum's statement conveyed pain, it did not indicate what part of Tatum's body was in pain, much less indicate that a shove to the head would foreseeably result in

surgery to remove bone spurs in the neck nineteen months later.

In addition, we think that the seriousness of the injury which resulted from the shove was insignificant when viewed from the perspective of a reasonable officer at the time of the arrest. After the shove, Tatum did not manifest any immediate physical pain. He did not scream in agony. He did not even say "ouch." Indeed, according to Tatum's deposition testimony, he did not complain of any pain at all until Austin had driven approximately one mile. Thus, under the circumstances of this case, a reasonable officer would not foresee that Austin's action would cause a "significant injury" within the meaning of Johnson.[5]

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[5] This case is distinguishable from those situations in which an officer hits a peaceful arrestee on the head with a nightstick or points a gun at nondangerous suspect. Cf. Johnson v. Morel, 876 F.2d 477, 481 (5th Cir. 1989) (Ruin, J., concurring) (arguing that the "severe injury" requirement is inappropriate because it would classify such actions as constitutionally permissible). Under such situations, a reasonable officer on the scene would foresee that his actions could cause significant physical

Having assess the nature and quality of Austin's actions, we must next balance it against the countervailing governmental interests at stake. Graham, 490 U.S. at 396. As the Supreme Court noted in Graham, "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Id. In this case, the governmental interest at stake was the safe and speedy placement of Tatum under arrest. To achieve a safe and speedy arrest, the use of handcuffs, without more, is reasonable. In addition, we have no difficulty in concluding that a necessary corollary to achieving a safe and speedy arrest is transporting the arrestee to the police station. The obvious method of transportation in this case was to place Tatum in Austin's patrol car. As Tatum appeared to be unable or unwilling to enter the patrol car without assistance, a

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or psychological injury.

reasonable officer in Austin's position could have concluded that touching Tatum's head in order to place him into the patrol car was not a constitutional violation.

In short, the nature and quality of the force used against Tatum was insignificant. The governmental interest in using the force-- to achieve a safe and speedy arrest-- was significant. Under the circumstances, we think that reasonable officers could differ ont he lawfulness of Austin's actions; therefore, Austin is entitled to qualified immunity. Harper, 21 F.3d at 600; Fraire, 957 F.2d at 1273; Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990).

B. Medical Attention Claims.

Tatum also alleges that Austin violated the constitution by failing to obtain needed medical attention for Tatum. In Esttelle v. Gamble, 429 U.S. 97 (1976), the Supreme Court interpreted the Eighth Amendment's prohibition against cruel and unusual punishment as prohibiting prison

officials from acting with deliberate indifference to the serious medical needs of convicted inmates. By contrast, under the Fourteenth Amendment's Due Process Clause, pretrial detainees may not be subjected to conditions or restrictions which amount to "punishment." Bell v. Wolfish, 441 U.S. 520, 536-37 (1979). We have interpreted the Bell v. Wolfish standard to entitle pretrial detainees to "reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987). Tatum contends that because he was an arrestee, Graham mandates that we use the Fourth Amendment's "reasonableness" standard applies.

The district court in this case applied the stricter "deliberate indifference" standard of the Eighth Amendment in denying Austin's motion for summary judgment on the medical attention claim. We need not decide at this time whether the Fourth, Fourteenth, or Eighth Amendment

provides the appropriate standard in such cases[6] because under each such standard, Austin's failure to seek immediate medical care for Tatum was not objectively unreasonable. See Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1988) (noting that if a defendant acts with "deliberate indifference" to a convicted inmate's medical needs, that same conduct would violate the "reasonable medical care" standard).

Viewed in the light most favorable to Tatum, the evidence indicates that Tatum told Austin three times that he was in pain. He asked Austin to remove the left handcuff so that his left arm would not hurt. On the other hand, Tatum never requested medical attention. Moreover, Tatum's injuries did not require immediate medical attention, and he has not alleged that the two to three hour delay in obtaining medical attention

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[6] The standard under which we evaluate inadequate medical attention claims filed by pretrial detainees is the subject of our recent decision in Hare v. City of Corinth, 36 F.3d 412 (5th Cir. 1994), reh'g granted en banc, December 8, 1994 (pending), as to which rehearing en banc has been granted.

caused any complications. Finally, when Tatum went to the emergency room following his release, the doctor who examined him released him without treatment.

Given that Tatum never requested medical attention, that his injuries were not the kind which required immediate medical attention, and his detention was of short duration, Austin's failure to seek immediate medical care for Tatum was not objectively unreasonable. Accordingly, Austin is entitled to qualified immunity for her actions.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

DOYLE V. TATUM	)	
	)	
V.	)	NO. 5:92-CV-48
	)	
THE CITY OF TEXARKANA, TEXAS, M. HAIRSTON; AND B. J. AUSTIN	)	

ORDER

Pending before the Court is the Defendants Mike Hairston's and Brenda Austin's Motion for Summary Judgment in the above-styled cause of action. After consideration of the motion and the response and the replies thereto, the Court finds that the motion is well taken in part and not well taken in part.

I. BACKGROUND

The plaintiff Doyle V. Tatum brings this civil rights cause of actin pursuant to 42 U.S.C. § 1983 and alleges that he was unlawfully arrested, that he was the victim of excessive force, and that he was denied medical attention.

On March 4, 1982, Loyce Gates, an Animal Control Officer with the City of Texarkana, issued a courtesy warning notice to Tatum for

alleged violations of the City's animal control ordinances. Specifically, the notice cited Tatum for failure to obtain a license for his dog and for failure to confine the dog to its owner's premises. The notice purports to be signed by Tatum; however, Tatum denies that he had any contact with the Animal Control Officer in 1982. Tatum further denies that he owned a dog in 1982.

On August 9, 1982, Officer Gates filed an offense report stating that she had made repeated attempts to contact Tatum to inform him of his continuing failure to comply with the violations outlined in the courtesy warning notice. Officer Gates also filed a sworn criminal complaint, and on September 10, 1982, Municipal Judge Audrey Poulos issued a warrant for Tatum's arrest for failure to have a current dog license tag, a Class C misdemeanor.

Almost eight years later, on May 1, 1990 around 9:00 p.m., Officer Dwayne Lorance, A City of Texarkana police officer and not a party to this lawsuit, visited Tatum's home in connection

with his duty of serving old misdemeanor warrants. Lorance advised Tatum of the outstanding charge and informed Tatum that he could visit the warrant officer within the next few days in order to resolve the matter. Lorance went off duty at 10:00 p.m.

At approximately 10:15 p.m. that same night, Tatum phoned the Texarkana Police Department and asked to speak to Lorance in order to "get that thing ironed out that night because [he] found out that [he] didn't have a dog and [he] didn't even live there [when the arrest warrant was procured in 1982]." At 10:27 p.., Officer Austin was dispatched to Tatum's residence. Officer Hairston heard the radio dispatch and arrived at Tatum's residence first to serve as Austin's backup. Hairston radioed the station to confirm the warrant. Tatum asked Hairston if he could appear the next day to speak with the warrant officer as agreed upon with Lorance. Hairston informed Tatum that he would have to make an arrest because he had confirmed the warrant.

Austin then arrived and assumed control as the arresting officer.

Hairston frisked Tatum, and Austin applied handcuffs. Prior to being handcuffed, Tatum informed the officers that he had prior neck or back surgery. Austin testified that Tatum sat himself in the police car without any physical contact by her or Officer Hairston. However, Tatum claims that as he began to seat himself in the vehicle, he experienced difficulty with his arms moving into the small of his back and indicated to Austin that "this is not going to work." Tatum alleges that Austin then stated that she had procedures to follow and put her hand on his head and shoved him into the vehicle. Tatum alleges that Austin's action caused him "severe and debilitating injuries."

Tatum further alleges that Austin denied him medical treatment for his injuries. He claims that during the drive to the police station, he requested Austin to release his left arm from the handcuffs three times because of "the

excruciating pain he was suffering in his upper spine and left arm." Austin contends that Tatum complained once but did not request medical attention. Tatum admits that he never specifically requested medical attention.

Tatum was booked and released on bond at 11:23 p.m. Thereafter, he went to the emergency room at Wadley Medical Hospital in Texarkana where he was examined and released. The next day he was examined by Dr. Warren Long, the neurosurgeon who had performed his prior surgery. In December 1991, Tatum underwent additional surgery.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact an that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must

demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the motion is made and properly supported, an adverse party may not rest on allegations or denials but must set forth specific and supported material facts. Fed. R. Civ. P. 56(e). Therefore, the nonmovant must bring forth significant probative evidence to prevent summary judgment. Union Planters Nat'l Leasing Inc. v. Woods, 687 F.2d 117 (5th Cir. 1982). To that end, the Court must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

When determining whether to grant summary judgment, the Court is merely determining whether a factual dispute exists, and is not required to resolve those disputes. Jones v. Western Geophysical Co., 669 F.2d 280, 283 (5th Cir. 1982). The fact that it appears to the Court that the nonmovant is unlikely to prevail at

trial or that the movant's statement of facts appears more plausible is not a valid reason to grant summary judgment. Id. at 283.

III. DISCUSSION

The defendants, Austin and Hairston, seek summary judgment of each of Tatum's claims on the ground that they are protected from suit and liability by qualified immunity. Tatum counters that there are genuine issues of material fact which preclude summary judgment.

A. Qualified Immunity

As police officers, Austin and Hairston are immune from both suit and liability unless it is shown that, at the time of the incident, they violated clearly established constitutional rights. Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992). The Court must follow the analytical structure set forth in Siegert v. Gilley, 111 S. Ct. 1789 (1991), when resolving a claim for immunity. The Court must first determine whether the plaintiff has "allege[d] the violation of a clearly established

constitutional right." Id. at 1783. If he had, then the Court must decide if the defendant's conduct was objectively reasonable. A finding of objective reasonableness entitles the defendant to qualified immunity regardless of whether a clearly established constitutional right of the plaintiff was violated. The reasonableness of the defendants' conduct is "assessed in light of the legal rules clearly established at the time" of the incident in question. Salas, 980 F.2d at 310. Of course, if there are triable issues of fact about whether an officer could reasonably believe his conduct was legal, then a jury should evaluate the question. White v. Walker, 950 F.2d 972, 976 (5th Cir. 1991).

The defendants do not contest that the plaintiff's claims allege the violation of clearly established constitutional rights. Furthermore, the Court finds that each of the claims allege the violation of clearly established law. Therefore, the Court will address only the second Siegert inquiry below.

B. Unlawful Arrest Claim

The defendants seek summary judgment of Tatum's unlawful arrest claim on the ground that there was probable cause for the arrest warrant, and, therefore, the arrest was lawful. In response, Tatum concedes that the City of Texarkana, Texas, is the "primary defendant to the unlawful arrest claim."[1] In fact, Tatum fails to address the unlawful arrest claim as it applies to Officers Austin and Hairston. It is undisputed that the officers confirmed the existence of the warrant via radio. It is further undisputed that the officers had no involvement in procuring the warrant.

Viewing the record in the light most favorable to Tatum and considering Tatum's failure to address the unlawful arrest claim as

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[1] Contemporaneously with the entering of this Order, the Court has entered an Order denying the Plaintiff's Motion for Summary Judgment on the issue of probable cause and determining that there are genuine issues of material fact for a jury to decide regarding the factual bases underlying the issuance of the warrant.

it applies to the officers, the Court concludes that there is no genuine issue as to any material fact and that summary judgment is appropriate with regard to Tatum's claims of unlawful arrest against Officers Austin and Hairston.

C. Excessive Force Claim

Defendant Officer Austin seeks summary judgment of Tatum's excessive force claim on the ground that she is entitled to qualified immunity. Tatum does not appear to assert an excessive force claim against Officer Hairston.

The Fourth Amendment, with its standard of reasonableness, governs claims of excessive force during arrest. Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 1870 (1989); Spann v. Rainey, 987 F.2d 1110, 1115 (5th Cir. 1993). In the Fifth Circuit, in order to state a claim for excessive force in violation of the constitution, a plaintiff must allege "(1) a[n]...injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively

unreasonable." Spann, 987 F.2d at 1115 (quoting Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc)).

The standard of objective reasonableness is "not capable of precise definition or mechanical application." Spann, 987 F.2d at 1115. In order to determine whether the officers' conduct was objectively reasonable in light of clearly established law at the time,[2] the Court must closely examine the facts and circumstances of each case, "including the severity of the crime at issue, whether the suspect p[oses an immediate threat to the officers or others, and whether he is actively resisting arrest or attempting to evade by flight." Graham, 490 U.S. at 396, 109 S. Ct. at 1872.

Tatum alleges that Officer Austin inflicted "severe and debilitating injuries" on him during

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[2] The arrest occurred in May 1990. Therefore, Johnson v. Morel, quoted *supra*, governs the standard for excessive force in the course of arrest.

his arrest for a misdemeanor failure to secure a dog license. It is undisputed that Tatum's behavior during the arrest was completely non-violent and peaceful. Nor is it disputed that Tatum informed the officers of his neck and back problems.

Both Hairston and Austin testified in their depositions that under the facts and circumstances of the night of May 1, 1990, there was no need to use any degree of force to secure Tatum's arrest. Hairston and Austin further testified that the use of any force in Tatum's situation would have been contrary to City of Texarkana police policies and procedures.

On this record, considering the facts in the light most favorable to Tatum, the Court cannot conclude that Officer Austin's actions were objectively reasonable. Accordingly, summary judgment is inappropriate with regard to Tatum's excessive force claim against Officer Austin.

D. Denial of Medical Attention Claim

Defendants also seek summary judgment of the plaintiff's claim of denial of medical attention.

Under the Eighth Amendment and the due process clause of the Fourteenth Amendment, "pretrial detainees are entitled to reasonable medical care unless the failure to supply the medical care is reasonably related to a legitimate governmental objective." Pedraza v. Meyer, 919 F.2d 317, 318 (5th Cir. 1990) (quoting Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987)). The Fifth Circuit has held that "prison officials have a duty, at a minimum, not to be 'deliberately indifferent' to a prisoner's serious medical condition." Id. at 318.

As discussed above, it is undisputed that both Officer Austin and Hairston were told by Tatum that he suffered from a neck and back condition. Tatum claims that he indicated to Officer Austin that it was painful for him to sit with his hands cuffed behind him. Tatum also claims that he told Austin that he was suffering "tremendous pain" in his left arm and that he

asked her three times to release his left arm. Tatum asserts that Austin ignored his complaints. Austin, however, contends that Tatum's only indication to her that he might be having physical difficulty during the drive to the station was his statement that he was "uncomfortable."

Considering the facts in the light most favorable to Tatum, the Court is unable to conclude that there is not a genuine issue of material fact as to whether Officer Austin's conduct demonstrated deliberate indifference to his medical condition. Accordingly, summary judgment with regard to this claim is inappropriate.

E. State Law Claim

Finally, the defendants seek summary judgment of the plaintiff's state law claims of negligence against them. The Court notes that Tatum has wholly failed to respond to the motion as it relates to the state law negligence claim. As discussed in Section II above, Fed. R. Civ. P.

56 and the relevant case law require the nonmovant to bring forth significant probative evidence to prevent summary judgment. After reviewing the record, the Court concludes that there are no genuine issues of material fact with regard to the plaintiff's state law negligence claim against Officers Austin and Hairston. Accordingly, summary judgment is appropriate with regard to that claim.

IT IS THEREFORE ORDERED that the Defendants Mike Hairston's and Brenda Austin's Motion for Summary Judgment is hereby GRANTED as to the plaintiff's unlawful arrest claim and state law negligence claim.

IT IS FURTHER ORDERED that the Defendants Mike Hairston's and Brenda Austin's Motion for Summary Judgment is hereby DENIED as to the plaintiff's excessive force claim and denial of medical attention claim.

SIGNED this 22nd day of September, 1993.

SAM B. HALL, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5370

DOYLE V. TATUM,

Plaintiff-Appellee,

V.

CITY OF TEXARKANA, ET AL.,

Defendants,

M. HAIRSTON and B.J. AUSTIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

(March 3, 1995)

Before WISDOM, KING, and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

Carolyn Dineen King
United States Circuit Judge